

An appeal

- by -

Karen Mandair
(“Mandair”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/45

DATE OF DECISION: August 8, 2007

DECISION

SUBMISSIONS

Karen Mandair	on her own behalf
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Karen Mandair (“Mandair”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 20, 2007.
2. The Determination was made on a complaint filed by Karen Mandair against Updesh Ghuman carrying on business as Garden Gate Wedding Centre, The Décor House, Art of the Wedding, Art of the Wedding at The Décor House, The Décor House at Garden Gate and Garden Gate (“Ghuman”). The complaint alleged Ghuman had contravened *Act* by failing to pay regular wages, overtime wages and statutory holiday pay and annual vacation pay to Mandair in the period July 1, 2004 to June 28, 2005, which Mandair alleged was her period of employment.
3. The complaint was dismissed because the Director concluded Mandair was not an employee under the *Act* and, consequently, the *Act* did not apply to her complaint.
4. The Determination was the result of referral back ordered by the Tribunal in its decision, BC EST #D004/07.
5. Mandair says the Determination is flawed by a failure by the Director to comply with principles of natural justice in making the Determination. Mandair also says that evidence has come available that was not available at the time the Determination was being made.
6. The Tribunal has reviewed the appeal and the material submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The issue raised in this appeal is whether the Director erred in concluding Briggs was not an employee under the *Act*.

THE FACTS

8. The Determination provides the following background information:

The alleged employer, Ghuman, operates a wedding consulting and event planning company which falls within the jurisdiction of the Act. The main function of the business is to decorate halls and/or homes for weddings; the business provides both decorations and the service of setting

up the decorations. Ghuman has operated the business under many names over the past few years including the following: Garden Gate Wedding Centre, The Décor House, Art of the Wedding, Art of the Wedding at The Décor House, The Décor House at Garden Gate and Garden Gate.

A company search of the BC Online Corporate Registry on all of the above listed business names only provided results for Crystal House of Décor Inc. The Active and Historical Corporation listings as well as the Active and Historical Firm listings were also checked, but with no results except for Crystal House of Décor Inc. The BC Online Corporate Registry listed two Directors for Crystal House of Décor Inc.: Ghuman and Mandair. There is no officer information provided. Crystal House of Décor Inc. was incorporated on April 27, 2005.

9. The Director conducted a complaint hearing, which was attended by Mandair and Ghuman, each acting on her own behalf, and by several witnesses called by each of the parties. The Determination sets out the following findings:
- Mandair and Ghuman were both interested in and intended to create a business relationship when they originally met in the fall of 2003.
 - Mandair never received any wages, or other monies, directly from Ghuman from July 2004 to June 28, 2005. Mandair said she had collected some monies from clients of the business, which cheques were made out to her personally, and she had deposited these monies to her own account.
 - Mandair and Ghuman jointly entered into a contract for the purchase of two retail units in March 2005. The units were intended by the parties to be used as a location from which to operate the business. Each party was to have contributed \$10,000.00 for the deposit on the purchase. The transaction was never concluded.
 - Mandair personally paid more than \$16,000.00 for expenses incurred by the business between February 2004 and May 2005.
 - In April 2005, Mandair registered a company by the name of Crystal House of Décor Inc. listing Mandair and Ghuman as directors of the company.
 - One of the witnesses, Inder Dhaliwal, testified that Mandair had told her she was to be Ghuman's partner. This evidence was accepted.
 - Only one other witness, Ruby Deol, who said that Mandair asked her to help out in the business, was able to provide evidence that assisted with the central issue of the relationship between Mandair and Ghuman.
10. Mandair has filed a substantial submission with the appeal. The central thrust of the submission is that the delegate who conducted the complaint hearing and made the Determination was unfair, made mistakes and untrue statements in assessing the evidence given by some of the witnesses for Mandair and accepted untrue evidence. There is nothing in the appeal submission that could be characterized as new evidence.

ARGUMENT AND ANALYSIS

11. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
 112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
 - (a) *the director erred in law;*
 - (b) *the director failed to observe the principles of natural justice in making the determination;*
 - (c) *evidence has become available that was not available at the time the determination was made.*
12. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. In particular, and in the context of this appeal, the burden of showing the Director failed to comply with principles of natural justice in making the Determination is on Mandair (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).
13. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
14. I shall first consider whether the new, and additional, evidence that Mandair has submitted with her appeal should be accepted and considered by the Tribunal.
15. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03).

16. The Tribunal has, however, accepted that a less strict approach to new evidence is warranted where the new evidence is adduced for the purpose of showing a breach of procedural fairness (see *J.C. Creations Ltd o/a Heavenly Bodies Sport*, BC EST #RD317/03).
17. The new, or additional, evidence comprises the following:
- i) an unidentified hand written statement comprising one page;
 - ii) two statements from Garry Billan: one commenting on his view of the delegate's handling of the hearing and the delegate's summary of the evidence given by him; and the other commenting again on his view of the delegate's handling of the hearing and providing additional evidence;
 - iii) a statement from Lance Knight commenting on his view of the delegate's handling of the hearing and his perception of the treatment of Mandair;
 - iv) a statement from Mandair's husband;
 - v) a copy of a document purporting to be a draft agreement to sell/purchase the flower shop of Mandair Distributors Ltd.;
 - vi) a statement from Cindy Mangat, speaking to her understanding of the relationship between Mandair and Ghuman;
 - vii) a statement from Beeru Mannan, speaking to her understanding of the relationship between Mandair and Ghuman;
 - viii) a statement from Prem Goundar, speaking to her understanding of the relationship between Mandair and Ghuman;
 - ix) a statement from Grant Mandair, the complainant's son, expressing some facts relating to his working for the business and his personal view of Ghuman;
 - x) a statement from Harbir Mandair, the complainant's nephew, expressing some facts relating to his working for the business; and
 - xi) a statement from Rajinder Goyal relating an experience she had in dealing with the business.
18. Having reviewed the appeal submission and the additional evidence which Mandair seeks to submit with the appeal, I conclude, with three exceptions, it should not be accepted under either the applicable provision of the *Act* or under the general discretionary authority of the Tribunal to allow additional evidence on appeal.
19. All but three of the pieces of additional information contain evidence that was reasonably available and could have been provided by Mandair during the complaint process. As well, and in any event, I am not satisfied this information adds anything to the body of evidence which was already before the delegate. Nor am I satisfied any of this information proves Ghuman's witnesses were lying under oath. Even if accepted as additional evidence, the statements, being unsworn and not tested under cross-examination, have little evidentiary value.

20. The other three pieces of information, included in the two statements from Garry Billan and the statement from Lance Knight, contain comments that go to natural justice arguments and will be considered in that context, but only in that context. I also note that even these statements suffer from the same deficiency as those above, being unsworn and not tested by way of cross-examination.

21. Mandair says the Director failed to observe principles of natural justice in making the Determination. The basis for this ground of appeal is found in the opening paragraphs of Mandair's appeal submission:

I wish to appeal the Determination of the Employment Standards Tribunal [sic]. A hearing was held on March 14, 2007. A very unfair hearing where Ghuman and her witnesses all lied under oath.

The attitude of Ravi Sandhu (Delegate of the Director of Employment Standards) was totally unfair and rude right throughout the hearing. His mind was already set how the Determination was going to be issued.

22. Mandair alleges the following matters, considered separately or together, comprise a breach of natural justice:

"Ghuman was allowed to enter the hearing without prior notice as to what witnesses she was bringing with her that morning, or what additional paperwork she was producing."

"She did produce some new submissions that Ravi Sandhu did accept. He never showed it to me. However, he did photocopy some of my new submissions and gave them to Ghuman."

"Mr. Dhaliwal [a witness called by Mandair] was not allowed to appear as a witnesses [sic], because perhaps it was not important, or it was not relevant, the lines Sandhu used throughout the hearing only when it came to my witnesses."

"Mr. Sandhu's rudeness continued throughout the hearing. He told me that I cannot have my witnesses called by telephone because the boardroom was not set up with proper telephones."

"The parties were also informed that no interpreter will be present, that only English speaking witnesses will be accepted. . . Ghuman presented her witness a totally uneducated woman . . . Sandhu instantly made one of Ghuman's other witnesses, Inder Dhaliwal, a [sic] interpreter and the hearing continued".

"Further more, Sandhu has twisted the sworn testimonies [of] my witnesses to suit Ghuman, or his Determination."

23. In response, the Director says:

(a) Both parties were asked at the outset of the complaint hearing to identify the witnesses they would be calling: Mandair identified five witnesses, two of which would testify by phone, and Ghuman identified four witnesses. All of the witnesses identified by both parties testified. There were no objections to any of the witnesses.

- (b) Mandair did not say she did not have copies of submissions and documents. Two documents introduced by Ghuman were in the file. All documents on the file were exchanged between parties before the hearing date.
- (c) Mandair chose not to call Mr. Dhaliwal. There was no decision by the delegate to refuse to allow him to give evidence.
- (d) Two of Mandair's witnesses were heard by telephone. Mandair was not told those witnesses could not testify by telephone.
- (e) Mandair's witnesses said they were not aware of any partnership between Mandair and Ghuman and that, to their knowledge, Mandair was an employee of the business.
- (f) Both parties were told at various times that questions regarding the other party's personal life were not relevant to the issue in dispute.

24. The lack of a response from the Director on the allegation that one of Ghuman's witnesses was used as an interpreter is somewhat troubling. I do not, however, consider this matter (accepting it occurred as Mandair describes it) to be significant as the Determination indicates the evidence of the witness in question was not helpful in deciding whether Mandair was an employee of the business.

25. The statements from Garry Billan and Lance Knight speak mainly to allegations of bias against the delegate conducting the complaint hearing. The relevant portions of the statements from Mr. Billan say:

“ . . . I was extremely disappointed with the manner in which the delegate handled the hearing. . . . ”

“ . . . I would like to inform you of the manner in which the delegate handled the witnesses. . . . The delegate allowed Ghuman's witnesses to give their evidence. When asked about Mandair's witness, he said he did not want to hear from Mandair's witness and that he was free to go.”

“I found the hearing to be very bias. Ghuman did walk in with only two witnesses, and then with the consent of Ravi Sandhu called two more. She did not submit any previous submissions as to whom she would be bringing, and what they would be saying.”

“I feel Sandhu has failed to observe principles of natural justice.”

26. The relevant part of the statement from Mr. Knight says:

“ . . . I was a witness at the hearing on March 14, 2007. I witnessed an unfair practice as to the way the delegate treated Ghuman from Mandair. Ghuman was allowed to present all her witnesses and Mandair was not. I got the feeling the delegate was prejudiced against Mandair.

27. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be fairly heard by an independent decision maker. Parties alleging a denial of natural justice must provide direct and cogent evidence in support of that allegation. There is no evidence in the appeal that shows the Director failed to ensure that Mandair was fairly heard: the Record shows she was clearly aware of the issues (and that one of the issues was whether she was a business partner with Ghuman); she received the material that was on the file before the hearing date; there is no evidence that she was not provided with copies of documents that were submitted by the other party at the complaint hearing; she participated fully in the complaint hearing; she was able to call witnesses in support of her position and cross-examine the

witnesses of the other party. The evidence does not indicate that the delegate conducting the complaint hearing prevented a witness from giving material evidence. The Record shows that Mandair had provided the Director with a summary of the evidence she anticipated her witnesses would provide at the complaint hearing. The summary relating to Mr. Dhaliwal's evidence indicates he would not have been helpful on the issues raised in the Determination.

28. In the appeal, Mandair has alleged bias against the delegate conducting the complaint hearing. The Tribunal has recognized that allegations of bias are serious allegations, requiring the clearest of evidence (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99). The allegations are based on Mandair's own observations and opinions, supported by the observations and opinions of others, some named and some unnamed. However, Mandair has not provided any evidence from which a reasonably informed bystander could reasonably perceive bias on the part of the delegate conducting the complaint hearing. The allegations of bias flow from a superficial overview of the proceedings and consist mainly of subjective impressions made by Mandair and other individuals about the complaint hearing. In this case, as in any case involving allegations of bias, there is an initial presumption of impartiality. That presumption is not overcome by presenting subjective impressions based on observations made, as has been done here.
29. Mandair has not shown there is any validity to the natural justice ground of appeal. As a result, the appeal is reduced to no more than a disagreement with factual findings made by the delegate from the evidence provided and, ultimately, with the conclusion based on those findings. It is apparent from the appeal submissions that Mandair and some of the persons who support her claim take exception to the way the delegate handled the evidence provided by some of the witnesses. However, as indicated above, the Tribunal has limited authority to accept appeals based on challenges to findings of fact. In this appeal, Mandair has not shown the delegate committed an error of law in respect of the factual findings made.
30. For the above reasons, the appeal is dismissed.

ORDER

31. Pursuant to Section 115 of the *Act*, I order the Determination dated April 20, 2007 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal